

Supreme Court, U.S.  
**FILED**

**MAY 26 1987**

**JOSEPH F. SPANIOL, JR.**  
**CLERK**

No. 86-1724

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1986

MARTIN E. O'MALLEY

Petitioner,

vs.

XEROX CORPORATION, a Corporation;  
JOHN M. JETT; and WALDAMAR W. MILLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEAL OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION TWO

BRIEF IN OPPOSITION

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Xerox Corporation<sup>1/</sup> John M. Jett  
and Waldamar W. Miller (collectively  
"Xerox") respectfully submit this Brief  
in Opposition to the Petition for Writ  
of Certiorari ("Petition") of Martin E.  
O'Malley ("Petitioner").

I.

NO FEDERAL ISSUES ARE STATED

As discussed below, no federal  
issues are presented in this matter or  
have been presented at any point in this  
lawsuit.

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1. A list of non-wholly owned sub-  
sidiaries is attached hereto as Appendix  
A.

## II.

### STATEMENT OF THE CASE

#### A. Nature of the Case

This action arises out of Petitioner's involuntary discharge from employment by Xerox Electro-Optical Systems ("XEOS"), an unincorporated division of Xerox. Petitioner, who has declared under oath that he is an attorney and is in good standing with the bar of the State of Illinois, was hired by Xerox on August 23, 1979 at the age of 59. Petitioner admitted in deposition testimony that during the years prior to his employment with XEOS, Petitioner had five different employers and significant periods of unemployment, which history was not accurately reflected on the resume presented to Xerox. Beginning in

August 1980, Petitioner's supervisor, John M. Jett, counseled Petitioner about his work performance. From August until his termination date in December 1980, Petitioner was counseled about his work performance on numerous occasions. On September 23, 1980, Petitioner was placed on a 60-day probation for unsatisfactory work performance. Petitioner's work performance during the probationary period did not improve, and he was terminated on December 5, 1980, approximately 15 months after he was hired.

B. Procedural History

On March 12, 1981, Petitioner filed an action in the United States District Court, Central District of California, against Xerox and his supervisors,

John M. Jett and Waldamar W. Miller, claiming age discrimination (the "Federal Action"). Along with this charge were three state law claims for breach of contract, tortious interference with contract and defamation. After taking discovery, Xerox filed a motion for summary judgment.

In a summary judgment entered on January 10, 1983, the Honorable Consuelo B. Marshall dismissed Petitioner's age discrimination and defamation claims with prejudice. In its Findings of Fact and Conclusions of Law, the federal court made extensive factual findings concerning Petitioner's employment, including the fact that Petitioner admitted that no one at Xerox had ever done anything to suggest that he was

being discriminated against on the basis of his age (Petitioner merely asserted that age was the only possible reason he could think of for his discharge).

Petitioner's two remaining state law claims were dismissed without prejudice under the federal court's discretionary power to dismiss pendent state law claims. Petitioner did not appeal the judgment in the Federal Action.

Nearly one and one-half years after the entry of summary judgment in the Federal Action, Petitioner brought the action leading to this Petition in the Superior Court of the State of California for the County of Los Angeles against the same defendants he sued in the Federal Action. The new lawsuit contained four causes of action:

(1) breach of contract against Xerox;  
(2) fraud against Xerox, Jett and Miller;  
(3) intentional interference with contractual advantage against Jett and Miller; and (4) intentional infliction of emotional distress against Jett and Miller.

In a judgment signed on November 5, 1985, the trial court, the Honorable Daniel L. Fletcher presiding, granted Xerox's motion for summary judgment on all four causes of action. Shortly thereafter the court denied Petitioner's motion for reconsideration.

Petitioner appealed the trial court's judgment on the breach of contract, fraud and emotional distress causes of action. - The California Court of Appeal, in a unanimous and



unpublished opinion, upheld the trial court's granting of summary judgment on the grounds that all three of the claims in question were barred by the applicable statutes of limitations. Petitioner also filed a motion for rehearing with the Court of Appeal, which was denied.

Petitioner's Petition for Review to the California Supreme Court was denied on January 21, 1987.

### III.

#### SUMMARY OF ARGUMENT

Petitioner has not at any point in this lawsuit raised any federal questions. The opinion of the California Court of Appeal was based solely on the grounds of state statutes of limitations.

#### IV.

#### ARGUMENT

Petitioner has not complied with Supreme Court Rule 21.1(h) because he has failed to state at which stage in the proceedings below the purported federal issues listed in his Petition were raised. Indeed, Petitioner cannot comply with Rule 21.1(h) because he never raised federal issues at any time in the state court proceedings. Petitioner's statement of issues in his opening brief to the California Court of Appeal was as follows:

"1. Is the cause of action in Fraud barred by the Statute of Limitations?

2. Is the cause of action in Breach of Contract barred by the

Doctrines of Res Judicata and Collateral Estoppel?

3. Is the cause of action in Breach of Contract barred by the Statute of Limitations?"

Petitioner's statement of issues in his Petition for Review to the California Supreme Court was as follows:

"1. Is a written employment contract invalid if it does not contain a term of duration of employment?

2. Did the employment contract contain limitations of employer's right to terminate appellant?

3. Were those causes of action dismissed without prejudice in the federal court res judicata which prevented appellant from refiling in the state court?

4. Dos (sic) the omission of a term of duration of employment in a written employment contract change the limitation period for filing an action from four to two years?

5. When does the statute of limitations commence under conditions of continuing emotional distress?

6. Can a summary judgment be granted if there are disputed issues of material facts?"

In addition to his own statements of issues, the absence of federal issues is also shown by the opinion of the California Court of Appeal, which states that the court's decision to uphold the summary judgment was based on statute of limitations grounds. See, Appendix A of

Petition for Writ of Certiorari, pp.  
A-7, A10 and A12 to 13.

Furthermore, Petitioner was not denied due process.<sup>2/</sup> If Petitioner truly was concerned that he had been denied due process in the trial court proceedings, he had ample opportunity to raise this issue in two different state appellate proceedings. Petitioner is merely attempting to avoid the inevitable judgment in his series of meritless and frivolous lawsuits and appeals

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2. Petitioner's accusations that counsel for Xerox engaged in unethical ex parte communications with the trial court are absolute falsehoods, and are made for the first time in his Petition. The accusations were never raised in the state court appellate proceedings.

against Xerox.<sup>3/</sup> His attempt to invent a federal issue never before raised simply highlights the frivolous nature of his claims.

V.

### CONCLUSION

Supreme Court Rule 17.1 states that a writ of certiorari will be granted "only when there are special and important reasons therefor." The criteria set forth in Rule 17.1 have as their basis the existence of a federal issue. Because no federal issue was decided,

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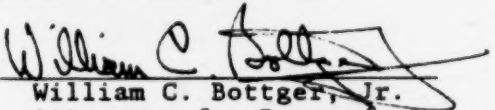
3. Petitioner also brought an action on behalf of the United States accusing Xerox of contract fraud, United States of America, ex rel., Martin E. O'Malley v. Xerox Corporation, D.C. Cal, Central District, No. 85-4515 AWT(Kx), which was dismissed on a Rule 12(b)(6) motion.

the present matter does not meet any  
criterion of Rule 17, and Xerox respect-  
fully submits that the Petition should  
be denied.

Dated: May 22, 1987

Respectfully submitted,

LATHAM & WATKINS  
William C. Bottger, Jr.

By   
William C. Bottger, Jr.  
Attorneys for Respondents

## APPENDIX A



The following is a list of Xerox Corporation's domestic and foreign subsidiaries. Xerox has no parent or affiliates.

#### Domestic Subsidiaries

American Health Capital HIBI Management, Inc., a New York corporation, Dimensional Corporate Finance, Inc., a California corporation, International Marine Underwriters of New England, Inc., a Massachusetts corporation, LWB Syndicate Inc., an Illinois corporation and the Genra Group, Inc., a Texas Corporation.

#### Foreign Subsidiaries

Burobail S.A., Copicentro S.A., Copicentros, S.A., Expro-Companhia de Comercio Exterior, Fuji Xerox Company Limited, Globe Park Management Limited,

Indian Xerographic Systems Private,  
Ltd., Xerox Mexicana S.A. de C.V.  
Investissements Xerographiques Marocains  
S.A., Korea Fuji Xerox Company Ltd.,  
Magua, S.A., Metalquimica de Bahia S.A.  
Industria Mecanica E. Quimica, Omminium  
de Participations Mercure S.A.,  
Philippine Fuji Xerox Corporation, Rank  
Xerox (Australia) Pty Limited, Rank  
Xerox Espanola S.A., Rank Xerox (Fi-  
nance) Pty Limited, Rank Xerox Greece  
S.A., Rank Xerox Holding, B.V., Rank  
Xerox Investments Limited, Rank Xerox  
Limited, Rank Xerox New Zealand Ltd.,  
Rank Xerox (Nigeria) Limited, Rank Xerox  
(Sales) Pty Limited, Roxfin (Proprie-  
tary) Limited, Societe Industrielle Rank  
Xerox S.A., Taiwan Fuji Xerox Corpora-  
tion, Thai Xeroxgraphic Systems Co.

Ltd., Versatec GmbH, Xerox Antilliana N.V., Xerox de Bolivia Limitada, Xerox do Brasil, S.A., Xerox de Colombia, S.A., Xerox Dominicana, C. por A., Xerox Egypt SAE, Xerox de El Salvador, S.A. de C.V., Xerox d'Haiti, S.A., Xerox de Honduras, S.A., Xerox (Jamaica) Limited, Xerox Maroc, S.A. Xerox de Panama, S.A. Xerox del Paraguay SRL, Xerox del Peru, S.A., Xerox Servicio Tecnicos, C.A., Xerox Trinidad Limited, Xerox de Venezuela, C.A., Xerox Credit (Bermuda) Ltd., Xerox Credit Overseas Finance N.V., Copiadores Nacionales, S.A., Copicentro N.V., Copicentro, S.A. de C.V., Kurzweil Computer Products Limited, Xerox Trading Enterprises Limited, Inversiones San Simon, S.A., Panama Services and Development Corporation,

Optimem Limited, Cheshire Mailing Systems Limited, Diablo Systems Limited, Versatec Electronics Limited, Xerox Computer Services Limited, Versatec S.A., Information Products S.A., Cheshire Buromaschinen GmbH, Diablo Systems GmbH, S.A. Computer-Peripheriegeraete GmbH, Xerox Computer Services B.V., Rank Xerox Manufacturing (Nederland) B.V., Societe Industrielle Rank Xerox S.I.R.X., Xerox Limited, Reprographics Egypt Limited, Bessemer Insurance Limited, Rank Xerox Cote d'Ivoire S.A., Rank Xerox Leasing GmbH, Xerox Products Limited, Xerox Products and Systems Limited, Albinstar Properties Limited, Bessemer Trust Limited, Rank Xerox Finance Limited, Rank Xerox Espanola S.A., Rank Xerox Financiacion S.A., Rank Xerox Finance

(Nederland) B.V., Rank Xerox (Ireland) Limited, Mitcheldean Enterprises Workshops Limited, Rank Xerox New Zealand Ltd., College Hill Properties Limited, Rank Xerox Leasing International Limited, NV Rank Xerox Credit S.A., Rank Xerox Leasing International Finance B.V., Rank Xerox Finance Limited, Rank Xerox Handelsgesellschaft mbH, Rank Xerox (Management) Limited, Rank Xerox Austria GmbH, Rank Xerox Vertiebs GmbH, Rank Xerox Management Services S.A., NV Xerox Management Services S.A., Rank Xerox A/S, Rank Xerox Finance A/S, Rank Xerox Oy, Rank Xerox GmbH, Rank Xerox Greece S.A., Rank Xerox SpA, Rank Xerox Salg A/S, Rank Xerox (Proprietary) Limited, Rank Xerox A.B., Rank Xerox Credit A.B., Rank Xerox A.G., Rank Xerox Uganda

Limited, Rank Xerox Rentalease B.V.,  
"Velco" Beheer Onroerend Goed V.B., Rank  
Xerox (U.K.) Limited, Rank Xerox (R&S)  
Limited, Rank Xerox Exports Limited,  
Xerox Business Equipment Limited, Rank  
Xerox (Copy Bureaux) Limited, Rank Xerox  
(Overseas) Limited, Rank Xerox Portugal  
Equipmentos De Escritorio, Limitada,  
Rank Xerox (Singapore) PTE Ltd. Rank  
Xerox (Hong Kong) Limited, RX Pensions  
Limited, Rank Xerox S.A., Societe  
Immobiliere Gambetta-Montrouge S.A.,  
Office de Transformation Papetiere S.A.,  
Rank Xerox Et Compagnie, S.N.C.,  
Burofinance S.A., Rank Xerox Equipment  
Services Limited, Rank Xerox Kenya Lim-  
ited, Fuji Xerox Far East Ltd., Fuji  
Xerox Office Supply Co., Ltd., Suzuka  
Fuji Xerox Co., Ltd., Fuji Xerox Distri-

bution Co., Ltd., Fuji Xerox Information Systems Co., Ltd., Fuji Xerox Engineering Co., Ltd., Kyoto Xerox Sales Co., Ltd., Hiroshima Xerox Sales Co., Ltd., Saitama Xerox Co., Ltd., Fukuoka Xerox Sales Co., Ltd., Hokkaido Xerox Sales Co., Ltd., Niigata Xerox Sales Co., Ltd., Gunma Xerox Sales Co., Ltd., Hyogo Xerox Sales Co., Ltd., Shikoku Xerox Sales Co., Ltd., Chiba Xerox Sales Co., Ltd., Kanagawa Xerox Sales Co., Ltd., Tokyo-Nishi Xerox Sales Co., Ltd., Tokyo-Higashi Xerox Sales Co., Ltd., Tokyo-Minami Xerox Sales Co., Ltd., Tokyo-Kita Xerox Sales Co., Ltd., Tama Xerox Sales Co., Ltd., Aichi Xerox Sales Co., Ltd., Aichi-Higashi Sales Corp., Ltd., Osaka-Kita Xerox Sales Co., Ltd., Osaka-Chuo Xerox Sales Co., Ltd.,

Osaka-Minami Xerox Sales Co., Ltd.,  
Miyagi Xerox Sales Co., Ltd., Fukushima  
Xerox Sales Co., Ltd., Nagano Xerox  
Sales Co., Ltd., Shizouka Xerox Sales  
Co., Ltd., Hokuriku Xerox Sales Co.,  
Ltd., Okayama Xerox Sales Co., Ltd.,  
Kitakyushu Xerox Sales Co., Ltd.,  
Kumamoto Xerox Sales Co., Ltd., Fuji  
World Office Machine Co., Ltd.,  
Westbourne Limited, Servicios  
Xerographics del Peru S.A., Shugart de  
Nogales, S.A. de C.V., Xerox Antilliana  
(Aruba) N.V., Xerox Antilliana (St.  
Maartin) N.V., Xerox Argentina,  
I.C.S.A., Xerox Canada Inc., Xerox de  
Chile S.A., Xerox de Costa Rica, S.A.,  
Xerox del Ecuador, S.A., Xerox Finance  
N.V., Xerox de Guatemala, S.A., Xerox de  
Nicaragua, S.A., Xerox Research (UK)



Limited, Xerox Uruguay S.A., Astoria Participacoes Ltda., Palma Servicos e Participacoes Ltda., Xerox do Amazonas Sistemas Reprograficos Ltda., Xerox Industrial e Commercial, S.A., Xerox Canada Acceptance Inc., Xerox Canada Finance Inc., Xerox Canada Holdings Inc., Xerox Canada Realty Inc., Compucolsa, S.A., Reprographics Egypt Limited Liability Company, Xerox Zona Libre, S.A., Lyell Holdings Limited, Constitution Reassurance S.A., Crum & Forster Insurance Company (Burmuda) Ltd., Crum & Forster of Canada Ltd., L.W. Biegler (Canada) Inc., and Herald Insurance Company.